



Generally Speaking

COMINGS and GOINGS

On April 28 the Administrative Services Division bid farewell to **Procurement Specialist, Gina Chalcroft**. She accepted a promotion with the Department of Commerce. The department wishes her well in her new position.

Labor and State Affairs Section **AAG Margaret (Mags) Paton-Walsh** is spending this spring in Washington, D.C., as a National Association of Attorneys General (NAAG) Supreme Court Fellow. This is a wonderful opportunity for Mags and the department will also benefit from her experience. She will return to the office in early July.

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CIVIL DIVISION

Child Protection

New CINA cases based upon allegations in the Office of Children's Services (OCS) petitions:

OCS assumed emergency custody of a teenager after she reported ongoing physical abuse at the hands of her brothers in the home. She reported her mother did not protect her and she was scared to go home. It also appeared that the teenager had some mental health issues that were not being taken care of by the family.

OCS received a report that a mother was not attending to the needs of her medically fragile child and failing to visit the child on a regular basis. The child was born premature and required extensive medical interventions that needed consent from the mother. She had only seen the child for a few hours over a 50-day time period and had no explanation as to why she wasn't visiting. OCS assumed custody.

OCS assumed custody of a newborn after conducting a home visit and finding the home filthy with animal feces and rotting food on the floors. Unknown men were also found sleeping on mattresses on the floor. The mother has a history of mental health issues that remain untreated and the father is a registered sex offender.

OCS assumed custody of a newborn, born drug exposed and one month premature. The mother admitted to using cocaine several days before the baby's birth and the father is out of the country. The baby was placed in the home of a relative.

A baby was brought to the hospital by family when they thought she was having a seizure. Upon further investigation, the child was found to

have a healing shoulder break and multiple healing skull fractures. The mother's explanations for the injuries did not adequately account for the injuries. The mother does not know the father's last name. OCS assumed custody.

OCS assumed emergency custody of two children after their mother, who has a history of mental illness, attempted suicide by overdosing on prescription medication. There was no one else to care for the children.

OCS received a report that a two-year-old child had unexplained multiple fractures of the legs. Additionally, the child had unexplained bruises and cuts to his face. The mother's explanations for the injuries did not fit the injuries medically. The father is unknown. Due to the extreme risk of harm if left in his mother's care, OCS assumed custody.

Numerous other children across the state were taken into custody as a result of serious risk of harm due to their parents' substance abuse, domestic violence and/or incarceration.

Commercial and Fair Business

Coffman Cove Adventures Settlement

The Attorney General's Office entered into an Assurance of Voluntary Compliance (AVC) with the owners of the business, Coffman Cove Adventures, located on Prince of Wales Island, resolving allegations that the business violated the Consumer Protection Act by engaging in deceptive advertising on their website. The website contained misleading information and testimonials which implied that the business had been in business for a number of years, when it is actually a brand new business, and that it provides fish guiding services, when it does not. The AVC requires the business to correct its website, provide accurate, non-misleading information in all future advertising, send notices to clients with correct information about the

business, and provide a refund to any client who requests a refund.

Enforcement Action Filed Against Travel Company

The Consumer Protection Unit filed an enforcement action against a travel company, Alaska 4 Seasons, and its owner, Brigitte Heath, for violations of the Consumer Protection Act. Alaska 4 Seasons had previously entered into an Assurance of Voluntary Compliance with the state in 2007 regarding its business practices. The allegations in the complaint include the business's failure to provide refunds for group tours that were cancelled within the period in which the business had promised full refunds. The state is seeking injunctive relief to force the company to make good on its agreements, to pay refunds and is seeking civil fines for violations of the Consumer Protection Act.

Superior Court Affirms RCA

The Alaska Exchange Carriers Association appealed an order of the Regulatory Commission of Alaska (RCA) that allowed the association to adjust its filed rates prospectively but not retroactively. Superior Court Judge Jack Smith upheld the commission's order.

The appeal arose out of the association's 2007 tariff filing, where the association sought commission approval of an array of new rates, generically referred to as "access charges". ("Access charges" are the rates paid by long distance telephone companies for access to the facilities of local exchange telephone utilities and for various ancillary services which the local companies provide. The association administers a common tariff for access charges on behalf of its member local telephone companies.) After reviewing a detailed analysis of the association's submission by its advisory staff, the commission approved the revised tariff sheets and allowed the proposed new access charge rates to become effective as of April 1, 2007.

Unfortunately, the association had made a serious mistake in developing its new rates, a consequence of which was one rate in particular was substantially too low. No one was aware of the association's mistake prior to the commission's approval of the association's tariff filing. The magnitude of the mistake was \$1.6 million on an annualized basis.

In August 2007, immediately upon discovering its mistake, the association sought RCA approval for an adjustment to its rates retroactive to the previously authorized April 1, 2007 effective date. After receiving extensive briefing and oral argument on the issue of retroactive ratemaking from all of the interested entities, the RCA concluded that the Alaska Supreme Court decision in *Matanuska Electric Association, Inc. v. Chugach Electric Association, Inc.*, 53 P.3d 578, 583 (Alaska 2002) was controlling and did not permit retroactive ratemaking.

Accordingly, the commission ruled that the association could adjust its rates on a prospective basis only.

In its appeal, the association argued that it was not seeking to implement retroactive ratemaking (an assertion directly contradicted by a passage in its reply brief), and presented court and commission decisions from other jurisdictions that take a more liberal approach to allowing retroactivity under some circumstances. However, in an orally-rendered decision (which runs to 16 transcribed pages), Superior Court Judge Jack W. Smith agreed with the commission that the *Matanuska Electric* case controls and that the association's non-Alaskan authorities were both factually-distinguishable and inconsistent with the Alaska Supreme Court's clear ruling in the *Matanuska Electric* case.

Accordingly, Judge Smith upheld the commission's final order and denied the association's appeal.

Environmental

M/V Selendang Ayu

IMC Shipping Co. (IMC) and Ayu Navigation have paid the State of Alaska \$844,707 to settle oil spill, wreck removal, and lost fish tax claims arising out of the December 2004 grounding of the M/V Selendang Ayu. IMC Shipping of Singapore was the operator and Ayu Navigation Sdn. Bhd., the owner, of the 738 foot Malaysian-flagged bulk freighter Selendang Ayu.

In December 2004, the Selendang Ayu went aground and broke apart off Unalaska Island. As a result of the grounding, some 354,218 gallons of bunker and diesel oil spilled into the ocean, oiled miles of coastline, and spilled thousands of metric tons of soy beans into the Bering Sea. IMC undertook actions to remove fuel remaining on the vessel and undertook beach oil spill cleanup actions in the spring and summer of 2005 and summer of 2006. The total cost of these cleanup actions were over \$100 million.

IMC undertook wreck removal operations in 2005 to remove portions of the stern section of the wreck. IMC later undertook a series of wreck removal actions in 2006 and 2008 to remove those portions of the stern section and hatch covers that had been driven ashore into inter-tidal areas, shallow submerged lands and beach areas.

Under terms of the settlement, IMC will pay a spill penalty of \$802,389 and trespass damages and a beach monitoring fund of \$36,000. With the exception of the Exxon Valdez spill, this is the largest civil oil spill penalty recovered by the state. The settlement also includes a \$1 million letter of undertaking issued by the vessel's insurers to cover wreck removal should any remaining portions of the submerged vessel move onto tidelands or beaches before August 30, 2015.

The settlement includes payment of \$6,318 to the state and to the City of Unalaska for each party's share of lost business fisheries taxes

resulting from closure of the tanner crab fishery as a result of the oil spill. The state has already recovered more than \$2.5 million in costs for cleanup, monitoring and other work related to the grounding.

The state is also pursuing separate natural resource damage claims in cooperation with state and federal natural resource trustee agencies. Those natural resource damage claims are not affected or resolved by this settlement. AAG Breck Tostevin represented the state.

Spill Contingency Plans

M/V Queensland

Pan Ocean Ltd. (Pan Ocean) paid the State of Alaska \$5,500 to settle claims arising from Pan Ocean's operation of the M/V Queensland in state waters without an approved non-tank vessel oil discharge prevention and contingency plan for seventeen days in 2008. The settlement reflects the deferred cost of oil spill coverage and the costs to the state in investigating and remediating the violations.

M/V Columbia

B+B Dredging Company paid the State of Alaska \$1,500 to settle claims arising from B+B Dredging Company's operation of the M/V Columbia in state waters without an approved non-tank vessel oil discharge prevention and contingency plan for a portion of 2008. The settlement reflects the costs to the state in investigating and remediating the violations.

AAG Michele Kane represented the state in both matters.

Air Settlements

AAGs Cam Leonard and Lindsay Wolter assisted the Department of Environmental Conservation's (DEC) Air Enforcement Program in settling several cases. In all cases the monetary penalty

was initially calculated based on the Environmental Protection Agency's Clean Air Act Penalty Policy and then adjusted to achieve a reasonable settlement.

Drift River Terminal

Several alleged opacity violations over the least few years settled for \$60,000. AAG Cam Leonard handled this matter.

Nikiski Terminal

Several permit violations at Tesoro's Nikiski Terminal settled for \$93,000. AAG Cam Leonard also handled this matter.

Alyeska Pump Station Three

Violations related to a non-road engine staying at one site for more than twelve months without a proper permit settled for \$12,000.

Harris Sand & Gravel

Source test violations by an asphalt plant settled for \$3,700. AAG Cam Leonard handled this matter.

Chugach Electric Association, Inc.

Permit violations at Chugach's Bernice Lake Power Plant settled for \$112,161. AAG Lindsay Wolter handled this matter.

Galena Airport

AAG Steve Ross assisted the Department of Environmental Conservation Contaminated Sites Program in preparing a Land Use Control Assurance Agreement (LUC Agreement), in connection with the transfer of approximately 84 acres of formerly U.S. Air Force owned property to the City of Galena. The LUC Agreement placed certain restrictions on the use of the property due to existing contamination, but enabled the property to be transferred to the city for beneficial reuse.

Human Services

Litigation Update

AAG Libby Bakalar and Section Chief Stacie Kraly received a favorable ruling on a motion to stay discovery pending a decision on their motion for judgment on the pleadings in the Psych Rights case.

The Division of Public Health received a favorable decision from the Alaska Supreme Court in *Huffman v. State of Alaska, Department of Health & Social Services*. In this case, two naturopaths challenged the state's school tuberculosis testing program on behalf of their children, on numerous grounds. The Court held that the affidavit of a naturopath could not be used to exempt children from the TB skin test requirement and that plaintiffs failed to show their objection to the skin test was religiously based. However, the plaintiffs did present a plausible claim that their fundamental liberty interests were infringed by the test, so the Court reversed the trial court's award of summary judgment on this point and remanded for further proceedings to determine whether there was a less restrictive alternative test. AAG Libby Bakalar represented the state at trial and will do so on remand. AAG Jim Cantor represented the state on appeal.

AAG Jonathan Clement appeared before the Alaska Supreme Court to argue a Medicaid provider audit case, *Hidden Heights Assisted Living vs. State of Alaska, Department of Health & Social Services*.

Licensing

AAG Rebecca Polizzotto represented the Department of Health & Social Services in a licensing hearing. The hearing involved the agency's decision to not renew a license to A Touch of Home Child Care & Learning Center as a result of multiple violations, including retaliation against complainants. The hearing was scheduled to last for seven days. After three, the

respondent withdrew her appeal and the agency's non-renewal of the facility's license became a final agency action.

AAG Rebecca Polizzotto also provided advice to the Department of Health & Social Services regarding eight active licensing investigations. Six investigations pertained to foster care licenses and resulted in the client suspending two licenses, placing conditions of licensure on two licenses, and issuing a warning letter with respect to another license. No action was taken with respect to the sixth investigation. The suspensions were imposed due to findings by the agency that the foster children in care had been abused.

Medicaid

The subrogation team opened 13 cases and closed 13 cases this month with an overall caseload of 938 open files at this time. Seven cases were settled and payment in one other case was received, for a total of \$45,184.60. From January through April 2009, \$202,673.38 has been recovered.

Other

AAGs Rebecca Polizzotto and Robin Fowler, along with Section Chief Stacie Kraly advised the Department of Health and Social Services on a residential psychiatric treatment center in Fairbanks. AAG Polizzotto advised on the licensing matters, Section Chief Kraly worked on the legislative issue and assisted AAG Fowler, who attended a site visit with the principal parties to work on issues.

AAG Kimberly Allen and Section Chief Kraly assisted the Department of Health and Social Services, Division of Senior and Disabilities Services, in preparing for a site visit/audit by the Centers of Medicare and Medicaid Services, which will commence on May 4. A number of legal documents were requested in very short order and many people assisted in this endeavor: Juneau Civil Office Manager Jennifer Ditcharo, Law Office

Assistants Jean Erickson, Raven Haffner, Debbie Spiech, Shelia Olsen, Shelby Mason, Tina Osgood and Alyssia Jones and AAGs Nevhiz Calik, Erin Pohland, Jonathan Clement, and Scott Friend.

Labor and State Affairs

Alaska Energy Authority

The Department of Law has been working closely with the Alaska Energy Authority (AEA) to develop and implement the renewable energy grant fund program established by HB152 in 2008. This program was enacted to grant \$250 million in five years for renewable energy projects throughout Alaska, including wind, solar, geothermal, wasteheat recovery, river in-stream, hydropower, and biomass energy projects. The department has assisted AEA in developing procedures and criteria for soliciting applications and for evaluating and ranking them. This has included development of criteria for evaluating technical and economic feasibility of proposals and for ranking them statewide and by region to achieve the statewide balance mandated by the legislature. Under this program, AEA was authorized to issue the first round of grants for FY09; for subsequent rounds it provides its recommendations to the legislature for appropriation. At each stage it is to consult with a renewable energy fund advisory committee established by the legislature. AEA moved quickly to solicit and evaluate applications for the first round of grants, and those grants, which total about \$95 million, are being issued now. The second round of applications has been processed and recommendations made to the legislature for funding. A \$25 million appropriation for these projects is pending in the legislature. In February, ten auditors from the Division of Legislative Audit reviewed AEA's processes for evaluating and recommending projects for funding. The auditors provided recommendations but did not identify any major issues. Presently AAG Mike Mitchell is working with AEA on programmatic regulations.

Alaska Public Offices Commission

APOC v. Stevens. The Alaska Supreme Court issued the decision in this case on April 17. The case involved a legislative financial disclosure statement that Ben Stevens filed with the Alaska Public Offices Commission (APOC) in 2006. The dispute involved compensation earned in 2005 (\$37,000) for service as a director of the SEMCO board. When Mr. Stevens joined the board, he agreed to defer his compensation and to invest it in stock. The agreement was irrevocable and the IRS did not consider the compensation to be income in 2005. After a complaint was filed with APOC in 2006 complaining that Mr. Stevens did not report all of his income in 2005, APOC sent him a disclosure form, asking him to report the income. Mr. Stevens reported the fact that he was paid income at that time. The commission assessed a penalty for the delay, and Stevens appealed. The Alaska Supreme Court concluded that the requirement to report deferred income was unclear. Although the Court found that APOC's interpretation of the law to require reporting was reasonable, it concluded that APOC could not penalize Stevens for the omission because APOC's regulations, forms, and instructions were unclear on this issue. However, the Court did state explicitly that its decision should not be understood to be a criticism of APOC, which it acknowledged makes an effort to make its rules understood. AAG Mags Paton-Walsh handled this appeal.

Education

Ryan v. Department of Education and Early Development. The superior court issued a decision this month in this action filed by the Disability Law Center (DLC) to object to the appointment of a surrogate parent for a child who is in state custody. After the child moved from Anchorage to Southeast Alaska, the new school district appointed a surrogate parent who lived in the community where the child had relocated. DLC argued that the district should have reappointed the existing surrogate parent, who

lived in Anchorage. After conducting an investigation on DLC's complaint, the department issued a decision that the school district had complied with all legal requirements in selecting the surrogate parent. DLC appealed to superior court and the court agreed with the department. AAG Neil Slotnick represented the department.

Motor Vehicles

Kim v. State. On April 20, 2009, Judge Aarseth affirmed an order of the Division of Motor Vehicles to revoke a driver's license in this case. The court agreed with the division that the appellant had waived his right to a hearing by failing to appear at it. The evidence showed that Mr. Kim received adequate notice of the hearing and did not provide good cause justifying missing it. AAG Krista Stearns handled the case for the division.

Office of Rate Review

This month a hearing officer issued summary judgment to the Office of Rate Review in North Star Hospital's appeal from the office's determination of the 2008 daily rate for Medicaid patients. The hearing officer found that the office properly calculated the rate. North Star had argued that \$600,000 had been improperly excluded from the cost base used to calculate the rate. Because rates are recalculated every four years, inclusion of the \$600,000 in the cost base would have increased payments to North Star by approximately \$600,000 per year for four years. This decision is subject to review and final decision by the Commissioner of Health and Social Services. AAG Tom Dosik handled this matter for the office.

Retirement and Benefits

Shea v. State. The Alaska Supreme Court issued its decision holding that the superior court abused its discretion in denying a motion to extend the time for filing a notice of appeal from an administrative agency decision. Here, the Public

Employees Retirement System (PERS) Administrator had denied an application for occupational disability benefits. The applicant appealed the denial to the Office of Administrative Hearings (OAH), which also denied the appeal on the merits. The applicant then tried to appeal in superior court but filed the appeal six days late, along with a motion to accept late filing. The state opposed the motion, and the superior court denied the motion without prejudice and invited the applicant's attorney to file a second motion showing "good cause" for the late filing. Instead, the attorney filed a motion for reconsideration, arguing that the appeal was only one day late and that the court should relax the filing deadline due to exigent circumstances. The court denied the motion for reconsideration, holding that the applicant failed to make a sufficient showing to relax the deadline. The applicant then appealed to the Supreme Court. The Court held that the applicant's motion for reconsideration had made a prima facie showing of good cause for the untimely filing of the notice of appeal and that the superior court abused its discretion when it denied the motion. Former AAG Gina Ragle wrote the brief in this matter. After AAG Ragle left state service, the case was assigned to AAG Brenda Page, who did the oral argument.

Favorable Decisions

The Office of Administrative Hearings (OAH) issued two proposed decisions this month in favor of the Division of Retirement and Benefits.

In the first, Administrative Law Judge Mark Handley proposed to affirm the administrator's decision to deny an employee's application for non-occupational benefits after finding that the ex-employee's condition was not disabling. Former AAG Gina Ragle represented the PERS administrator in a hearing held in January 2006.

In the second case, on April 23, 2009, OAH issued another proposed decision sustaining the PERS Administrator's denial of disability benefits. This case involved an equipment operator's claim

that he suffered permanent damage to his neck, shoulder and back, chronic pain, anxiety, and depression as a result of his job. The hearing record contained over 5500 pages of medical records from more than 25 medical and mental health professionals. Administrative Law Judge Rebecca Pauli carefully reviewed the record and concluded that the employee did not prove his claim to PERS occupational or non-occupational benefits. This decision resulted in a savings of \$414,600 to the PERS system. AAG Joan Wilkerson represented the administrator.

Special thanks to AAG Mike Barnhill for his hard work during the legislative session.

Legislation and Regulations

During the month the section worked on end-of-session legislation matters and bill review analysis for the Governor's Office. Additionally, the section edited and legally approved for filing the following regulations projects: 1. Department of Fish and Game (reporting requirements for purchasers of raw groundfish or halibut; reporting requirements for sport fishing services and guides); 2. Board of Fisheries (Southeast and Yakutat finfish regulations); 3. Board of Game (black bear predation control regulations); 4. Department of Administration (commercial driver's license medical standards); 5. Department of Health and Social Services (emergency regulations being made permanent regarding Medicaid reimbursement for physician services as calculated under a resource-based relative value scale (RBRVS)).

Natural Resources

Aleutians East Borough v. Gillis. On April 9, the state as third-party defendant, along with the plaintiff Aleutians East Borough, filed its opposition and cross-motion on summary judgment in this case, 3AN-08-9398 CI, an original action in Anchorage Superior Court. Gillis, a long-time big

game hunting guide operating on leased land conveyed by the state to the Aleutians East Borough, seeks a declaratory judgment that he is entitled to a preference right to purchase the land under AS 38.05.035(f). The state and Aleutians East Borough counter that the statute and the Department of Natural Resources regulations require a preference right applicant to have entered and constructed improvements on the land while it was still in federal ownership, and that Gillis does not meet this requirement. Gillis never applied to purchase the land while it was under state jurisdiction, and his claim is subject to multiple affirmative defenses. Final dispositive motions are due May 29. AAG John Baker represents the state in this case.

Appeal of State of Alaska (Doyon, Ltd.). On April 10, the state filed a notice of appeal and petition for stay in this case, IBLA No. 2009-169, an administrative appeal from a decision by the Bureau of Land Management (BLM) to convey certain lands to Doyon, Ltd., without reserving easements the state views as necessary to preserve public access in the Fortymile River area near Chicken. The state had earlier provided BLM with comments detailing the need to reserve certain trail easements comprising the Gold Creek-Chicken Ridge-Veta Mountain trail network. When BLM's final easement memorandum suggested alternative trail easements, the state provided rebuttal information. Nevertheless, BLM issued a final decision March 11 which declined to reserve any of the easements requested by the state. AAG John Baker represents the state in this appeal.

Defenders of Wildlife and Alaska Wildlife Alliance v. State. On March 18, the Defenders of Wildlife and Alaska Wildlife Alliance sued to halt the Department of Fish and Game's planned use of helicopters and employees to assist in meeting established predator control goals in the Upper Tanana area. On March 19, Superior Court Judge Jack Smith denied their requested temporary restraining order, agreeing with the state that the plaintiffs were unlikely to prevail on their argument that the department had no authority to

use its employees and helicopters to help the Board of Game accomplish its stated goals. On April 13, the parties stipulated to dismiss the suit. AAG Kevin Saxby handled the case for the Department of Fish and Game.

Marco Spezialy v. Department of Natural Resources, Trust Land Office. In 2000, Marco Spezialy applied to purchase, by negotiated sale, a parcel of Mental Health Trust land upon which he had a long-term lease. The land was former university-grant land. Spezialy (with the help of an attorney) and the Trust Land Office agreed on the conveyance of 40 acres, in exchange for Spezialy relinquishing the remaining 120 acres of the lease and payment of the appraised fair market value. The appraisal came in at \$88,000, and the sale was completed and title transferred in June 2002.

In 2008, Spezialy wrote to the Trust Land Office requesting a refund of more than \$64,000 of the purchase price, claiming that he should have been entitled to purchase the property at the 1983 fair market value under a session law known as HB 248, which allows certain lessees and their assigns to purchase the former university-grant land that they were leasing. Spezialy also claimed that he was entitled to an additional 25 percent discount based on the veteran's discount statute, and that the Trust Land Office should have informed him of all of these laws at the time he was negotiating the sale.

Spezialy argues that he is an assignee of the lease that allows him the benefit of the law, or that he is entitled to assert the former lessee's rights under the law. The former lessee had applied to purchase the property under HB 248, but failed to finalize the purchase after she lost an administrative appeal upholding the department's decision to convey the land subject to a 200' right of way. Spezialy did not become the lessee until 1993, when he executed on the lease to satisfy a judgment against the former lessee.

The Trust Land Office denied Spezialy's request for a refund on the basis that he was not qualified under the law to purchase the property at the 1983 value, that he did not acquire any right to purchase the property at the 1983 value, that his failure to raise the laws at the time he was negotiating the sale barred his current claims, and that he never informed the Trust Land Office that he was a veteran. Spezialy appealed to the superior court, and the state's brief is due April 30.

Wildland Fire Litigation Conference

From March 17-19, 2009, AAG Kevin Saxby attended the Wildland Fire Litigation Conference in Reno, Nevada. The seminars were very instructive. It is clear that Alaska has been quite lucky in avoiding many of the complicated litigation problems associated with big fires in the Lower 48.

Opinions, Appeals & Ethics

AAG Judy Bockmon addressed a number of informal ethics inquiries by email and phone this month. She also issued two written advisory opinions and concluded one complaint matter. Currently four complaints are in various stages of investigation: one complaint is pending final resolution and three others are preliminary investigations, two one of which are currently active.

During April the section continued to assist the Governor's Office with responses to the many pending public records requests. As part of the continuing effort to expedite responses to those requests, nine new people were recruited from other sections in the Civil Division to help review the records for privileged information. The section is enormously grateful for the help from AAGs Libby Bakalar, Mike Ford, Karen Ince, Michele Kane, Toby Steinberger, Tim Twomey, and paralegals Kamie Willis, Jean Clarkin, and Paula Wright.

The section is also deeply indebted to the members of the first wave of assistance with the pending requests – paralegals Molly Benson, Pam Post, Gretchen Knapp, Lori Yares, and AAGs Jonathan Clement, Jennifer Currie, Steve DeVries, and Bob McFarlane, who devoted the better part of two months to reviewing records and preparing privilege logs.

Appeals

Ted W. v. State, Department of Health & Social Services, Office of Children's Services, S-13130.

The Alaska Supreme Court issued a published decision in this Indian Child Welfare Act (ICWA) appeal. The Court held that an Indian parent who creates an Indian custodianship by entrusting her child to the temporary physical care, custody, and control of another Indian person may revoke the custodianship, even after the state removes the child from the custodian's physical custody and a court grants the state temporary legal custody over the child. The Court rejected the Indian custodian's argument that once a child protection case is instituted and a child is placed in the state's legal custody, an Indian custodian maintains his or her relationship to the child and status as a party to the child protection proceeding for as long as the proceeding is pending, and his argument that a parent loses the ability to undo an Indian custodianship when legal custody of the child is transferred from the parent to the state. The Court likened a parent's ability to revoke a temporary transfer of physical custody to the "residual rights" reserved by AS 47.10.084(c) to parents whose children are in the state's legal custody, but whose parental rights have not been terminated. The Office of Children's Services (OCS) had argued in that the mother's positive steps toward reassuming her parental role by working her case plan effectively terminated her earlier transfer of custody to the Indian custodian. The Court declined to decide whether the mother could have revoked the Indian custodianship if she had not taken such steps or if OCS had opposed her attempt to revoke the transfer.

The Court also declined to review an alternate basis for the trial court's decision – that parents and Indian custodians may not simultaneously participate as parties in a child protection proceeding, because ICWA contemplates participation by one or the other, but not both. AAG Mike Hotchkin briefed and argued the appeal; several AAGs participated in the case below.

E.P. v. Alaska Psychiatric Institute, S-12853.

The Alaska Supreme Court issued an opinion in this appeal, in which the section represented Alaska Psychiatric Institute (API).

E.P. was a chronic substance abuser whose substance abuse caused organic brain damage. Both his history and his comments to his API psychiatrist indicated that he would return to substance abuse – primarily huffing – whenever he was not in a controlled environment such as API. He voluntarily entered API, but when he wanted to leave, API successfully sought a series of involuntary commitment orders because he was likely to harm himself if released. E.P. challenged the legality of those commitment orders on appeal.

Sadly, while his appeal was pending, E.P. died of an acetaminophen overdose after being released from API. Although E.P.'s death and the expiration of the commitment orders made his appeal moot, the Alaska Supreme Court concluded that the public interest favored addressing the issues he raised anyway.

The Court held that, because E.P. was likely to harm himself due to his mental illness, Alaska's statutes permitted API to keep E.P. involuntarily, even though there was no reasonable belief that the treatment API provided would improve his condition. The Court concluded that, although drug addiction and alcoholism do not per se constitute "mental illness" under Alaska's statutes, E.P. was mentally ill because of the brain damage he suffered from his substance abuse. Because E.P.'s brain damage left him incapable of appreciating the dangers of continued huffing,

the court held that his history of, and comments about, returning to substance abuse established that, due to his mental illness, he was likely to harm himself and intended to carry out plans of seriously harming himself. Finally, the Court concluded that the superior court should not have approved the masters' commitment recommendations before E.P.'s time to object to those recommendations expired and should not have treated E.P.'s objections to the masters' recommendations as motions to reconsider the superior court's orders. But the Court concluded that those errors were harmless in E.P.'s case. AAG Dave Jones handled this appeal; former AAG Beth Russo had the case below.

Ben M. v. State, Department of Health & Social Services, OCS, No. S-13090. The Alaska Supreme Court issued a published decision in this case, affirming the termination of parental rights of a father to his child.

The father argued that the trial court should have continued the termination proceedings, which had already been continued several times, because his attorney was "too newly appointed" and because he needed additional time so that he could enter (and complete) a residential substance abuse treatment program. The Supreme Court rejected both arguments, noting that in order to demonstrate that the trial court abused its discretion in denying the request for a continuance, the father needed to show that he was deprived of a substantial right or was seriously prejudiced.

The father argued also that the trial court erred in concluding, beyond a reasonable doubt and based on expert testimony, that the child would likely suffer serious harm if returned to her father's care. In doing so, the father asserted that Dr. Michael Rose's testimony should not have been considered because he did not evaluate either the father or the child and his testimony was too general. The Supreme Court rejected these arguments, reiterating that "case law is clear that in-person meetings are not required and the requirement for expert testimony is that it support the ultimate conclusion. The

issues are whether the expert disregarded or was unaware of contrary evidence, and whether the testimony was so vague and generalized that the trial court clearly erred in according weight to it." The Court noted that Dr. Rose not only spoke generally about the risks posed to children exposed to parental substance abuse and domestic violence, but was aware of the father's history of drug use and criminal conduct, treatment, and relapses. It also noted that Dr. Rose's testimony was consistent with other evidence at trial and was not contradicted in any way.

In rejecting the father's active efforts argument, the Supreme Court looked to the extensive attempts made by the social workers to provide services for the father, even when he was incarcerated, and the father's repeated refusal to participate in such services, refusal to cooperate with the Office of Children's Services (OCS), and long periods in which he dropped out of contact with OCS and essentially disappeared. AAG Megan Webb represented OCS on appeal; AAG Steven Bookman represented OCS for the termination trial.

Schiel v. Union Oil Company of California, S-13058. AAG John Erickson had oral argument in the Alaska Supreme Court in this case that will address whether the 2004 statutory amendments to the Alaska Workers' Compensation Act violate the equal protection and due process provisions of the Alaska Constitution. The amendments provide that an employee of a subcontractor *cannot* maintain a tort action against the general contractor for an injury sustained as a result of the general contractor's negligence; but, an employee of a general contractor *can* bring a tort action against the subcontractor for an injury sustained as a result of the subcontractor's negligence.

Since appellant challenged the constitutionality of AS 23.30.045 and AS 23.30.055, the state was entitled to intervene as a matter of right, but it chose to participate as *amicus curiae*. On April 16th, AAG John Erickson, Jr. argued the state's

position before the Alaska Supreme Court, which then took the case under advisement.

Other Matters

The section had oral argument before the Alaska Public Offices Commission in *Kraft v. DNR*. This case initially involved the Department of Natural Resource's (DNR) webpage dealing with Ballot Measure 4, also labeled as "the Clean Water Initiative." Since a specific legislative appropriation directed DNR to "educat[e] the public regarding current state regulation of mining and mining activities in the state, including providing information that may influence the outcome of an election on initiatives affecting those mining activities," all claims regarding the webpage were resolved last fall. The only remaining issues at oral argument were whether the Governor has a constitutionally protected right to express her personal opinion of a ballot measure and whether she expended state funds when she stated how she personally was going to vote on Ballot Measure 4 at a state press conference on another matter. Alaska Statute 15.13.145 restricts the expenditure of state funds on ballot measures unless there has been a specific appropriation. The commission was prepared and asked many questions of both parties. A written decision is expected in the near future. AAG Mary Lundquist is handling this matter.

AAG Peter Putzier assisted the Department of Health and Social Services, the Department of Labor, and the Department of Transportation and Public Facilities with legislation during the session. Each bill had a tribal component. The state's child support program and unemployment insurance program both required changes in law to ensure continued federal funding. The Department of Transportation and Public Facilities legislation provided for state immunity when tribes perform work in Alaska pursuant to the Indian Reservation Road program. AAG Putzier was called upon to testify before numerous senate and house committees, and to discuss potential jurisdictional ramifications with legislators and legislative staff.

In addition, AAG Putzier negotiated directly with tribal members and various tribal attorneys. All three pieces of legislation passed and await transmittal to the Governor.

Regulatory Affairs and Public Advocacy (RAPA)

Rulemaking Comments Filed

R-08-03, telephone access charge reform. The Regulatory Commission of Alaska (RCA) opened a rulemaking proceeding in 2008 to further modify the in-state access charge system wherein long distance carriers have historically paid a fee (access charge) to use the local telephone carrier's network to complete toll calls for their customers. The RCA's currently proposed regulations would cap the access charge rate element and expand an in-state subsidy to pay for it. This would reduce access charges by approximately \$14 million, the payment of which would be cost-shifted to all local telephone service subscribers in the state. RAPA filed comments on April 3 opposing this proposal unless and until the RCA assessed whether a prior, related access charge reduction measure (that imposed a network access fee of \$3 per month on all local telephone users) has actually resulted in any commensurate benefits to consumers.

Adjudicatory Hearing

U-08-63, Potter Creek water. On April 2, 2008, Potter Creek Water Company (PCWC) filed to increase rates by 121 percent for water service to its 120 customers in south Anchorage. The Attorney General/RAPA elected to participate in the case and the Potter Creek Homeowners' Association also intervened. The parties pre-filed the direct testimony of their respective witnesses. RAPA staff witness Janet Fairchild questioned various affiliated transactions for ratemaking purposes, including the proposed land lease payment amount for reservoir use of real property

owned by utility owner Neil Bergt. Overall, RAPA's analysis of relevant evidence could support no more than a 6 percent rate increase.

Just prior to hearing, RAPA objected to the taking of evidence at hearing from new utility-proposed witnesses who had not provided pre-filed testimony in the case. Under the circumstances, the parties offered only closing oral arguments on April 13, in lieu of cross-examining the witnesses in the scheduled adjudicatory hearing. The parties agreed that there were no material facts in dispute and the case was tendered to the commission for adjudication. A decision by the commission is pending.

New Cases

U-09-12/13/14, Alaska Waste fuel surcharges. On February 27, 2009, the Regulatory Commission of Alaska (RCA) opened dockets to investigate recent filings by Alaska Pacific Environmental Services d/b/a Alaska Waste (Alaska Waste) regarding implementation of a fuel surcharge to rates for refuse service in the Anchorage, Kenai and Fairbanks service areas, respectively, and implementation of a tipping fee surcharge for its Anchorage property. The utility first implemented the surcharges on an interim/refundable basis in fall 2008. The Attorney General/RAPA elected to participate in the consolidated dockets on April 2.

These dockets pose a matter of first impression because there are currently no economically regulated, residential refuse haulers that charge a fuel or disposal surcharge, and the surcharge proposals do not incorporate a balancing account mechanism to 'true-up' over/under recovery of actual fuel costs in a given period of time. Reportedly the RCA intends to explore these matters as part of the rate cases scheduled to be filed by the utility on July 2, 2009. Until that time, no procedural calendar is anticipated.

R-09-04, rulemaking to implement e-filing procedures. The Regulatory Commission of Alaska (RCA) opened a rulemaking docket on

March 17, 2009 to consider regulations to implement electronic filing directly into the RCA case management system by parties to proceedings and the general public. The Attorney General/RAPA filed notice of its intent to participate on April 2 and attended an initial technical workshop on April 9. Meanwhile, RAPA has agreed to participate in the RCA beta group to test the RCA's currently proposed e-filing system. Section Chief Daniel Patrick O'Tierney distributed a memorandum outlining RAPA's internal protocol for RCA e-filing as part of the beta group on April 6.

Torts and Workers' Compensation

In a recent unpublished Ninth Circuit opinion, the court affirmed a dismissal by U.S. District Court Judge Burgess of a criminal defendant's 1983 action against the Deputy Clerk of the Alaska Appellate Courts. The criminal defendant was awaiting trial on a criminal case when disputes arose with his appointed counsel. For that reason and several others, several years passed between his indictment and his trial. He attempted several times through counsel and on his own to get his case dismissed for violation of his speedy trial rights. Eventually he sought habeas relief in federal court and a federal public defender was appointed. The federal district court judge denied Mr. Jarnig's petition because he had not exhausted his state law remedies. In passing, the district court noted that among the relief available, he had not yet sought extraordinary review before the Alaska Supreme Court. While he appealed the federal district court's ruling, he also filed several defective pleadings attempting to seek extraordinary review from the Alaska Supreme Court. The clerk screened and rejected the pleadings; however there were some delays in the processing of them.

Upon his release from jail, the criminal defendant sued the clerk in her individual capacity under section 1983 for allegedly violating his right to

access to courts. A motion for summary judgment based on absolute quasi-judicial immunity was filed on the clerk's behalf arguing that processing and rejecting the defective pleadings were akin to those of a judge and thus protected by absolute quasi-judicial immunity. Alaska's appellate rules governing requests for extraordinary relief require proof of exhaustion of all state law remedies or an explanation from the petitioner as to why such exhaustion is excused. The rules delegate this screening function to the Clerk of Court who in turn may delegate to a deputy clerk. Because the rules governing extraordinary review required an evaluation and application of the rules to the request for relief, the clerk's actions were absolutely immune. The trial court agreed. On appeal, the Ninth Circuit affirmed Judge Burgess's dismissal in an unpublished opinion. The matter was handled at the trial court level by AAG Rebecca Cain and the appeal at the Ninth Circuit was handled by AAG Patton-Walsh.

Pro se litigant Ben Latham brought an action against Governor Sarah Palin and former Attorney General Talis Colberg attempting to re-litigate an issue that had been resolved concerning 1995 changes to AS 12.55.120(a) (post conviction relief legislation). In the prior case (*Latham v. Public Defender*) Latham sued several state agencies, two governors and two attorneys general. AAG Stephanie Galbraith Moore filed a 12(b)(6) motion based on the doctrines of collateral estoppel and res judicata. The motion also included the doctrines of non-justiciability and absolute immunity. Judge Sharon Gleason granted the motion, and quoting *DeNardo v. Maasan*, 200 P.3d 305, 317 n. 63 (Alaska 2009), stated that due process does not entitle anyone to be heard on the same question over and over again.

The United States District Court dismissed all claims against the state and two district attorneys in a lawsuit alleging civil rights violations under 42 U.S.C. §1983. The case arose after plaintiff was criminally charged with a number of felonies, entered a no contest plea, and received a

suspended imposition of sentence. After plaintiff's conviction was set aside pursuant to the terms of the suspended imposition of sentence, he filed a civil tort case against the state and the criminal prosecutors who prosecuted the underlying criminal case. The state filed a motion for judgment on the pleadings on the grounds that plaintiff's claims against the state were barred by the 11th Amendment and that his claims against the individual prosecutors were barred because plaintiff's underlying criminal conviction precluded him from stating a viable §1983 claim and by prosecutorial immunity. Plaintiff moved to amend his complaint. The state opposed on the grounds that the amendments were futile because plaintiff's underlying criminal conviction was never expunged or declared invalid, and plaintiff could not therefore state a cognizable §1983 claim. The court agreed and granted the state's motion for judgment on the pleadings, denied plaintiff's motion to amend his complaint, and dismissed the case with prejudice. The state defendants were represented by AAG Janell Hafner.

CRIMINAL DIVISION

Anchorage DAO

Anchorage and Dillingham conducted 8 trials and 67 grand juries.

ADA Brittany Dunlop and DA Adrienne Bachman successfully completed the seven-week long murder trial against Erin Rogers, the young man who killed his father in Palmer then drove to Anchorage intent on killing as many people as possible. Rogers shot three people, including a UAA grad student who was warming up his car on a Sunday morning. Rogers took the stand and asserted that he didn't intend to kill anyone; he just wanted to avoid be apprehended by police. He said he'd been hearing voices, though he denied any mental illness.

ADA Regan Williams convicted two young men for the assault and strong-arm robbery of a stranger

who was parking his car when the two jumped into the back seat to rob him. The victim had the presence of mind to jump out of the car. Though he received a severe beating and lost the car, the circumstances suggested that something worse might have befallen him if he had not gotten out of the car so quickly. Though it did not come into evidence, one of the robbers, who had done this before and had a tattoo across his middle finger that says, "Pay Me" cried when the jury convicted him on all charges.

ADA Taylor Winston got a mixed verdict in a serial rape case against a young man who picked up four women on a single night. He claimed he was just a victim of circumstance and was just giving them rides. Despite protective orders precluding the defense from alleging that the women were prostitutes, the defense made the argument anyway. The judge then decided not to enforce the protective order. The jury did not trust some of the women.

ADA Tali Birch is on a roll. After securing the conviction of a man for misconduct involving a controlled substance in the sixth degree, she turned around and got a conviction of another man for DUI.

The pretrial discovery report instituted by the Anchorage Superior Court is now in full swing. Both prosecution and defense are responsible for identifying all discovery provided and any discovery that might be disputed. As expected, the prosecutors have been filing reports and filing timely.

The true highlight of the month was the 1950's Sock Hop that topped off the office Staff Appreciation Week. Poodle skirts, leather jackets and saddle shoes captured the mood. Burgers, fries and a milkshake station highlighted the food of the times and there was even a hula hoop contest. Fun times and lots of laughs were had by all.

Fairbanks DAO

A 26-year-old Tok man was sentenced to four years in prison with two years suspended following his conviction for felony assault in the second degree. In August 2007 the defendant had beaten the victim after both had been at a party and the victim had accused the defendant of being a "narc". Both victim and defendant were highly intoxicated. Prosecution was complicated by the fact that the victim was knocked unconscious early on in the attack and could remember very little. Other witnesses indicated the defendant repeatedly kicked the victim in the chest and head after he was already on the ground and unresponsive. The victim had several teeth knocked out during the attack. Before he could be arrested, the defendant fled the state. He was arrested in Montana in February 2008 when he was stopped for a routine traffic matter and officers there noticed his outstanding Alaska warrant. He was later extradited back to the State of Alaska where he has remained in custody. At his sentencing the judge emphasized how important it will be for the defendant to refrain from the use of alcohol during his five-year term of probation. The defendant was also ordered to pay \$19,215 in restitution for the victim's medical expenses.

A 33-year-old Fort Yukon man was charged with felony assault, reckless endangerment, reckless driving, driving with a revoked license, and resisting arrest after a midnight snow machine ride his passenger is not ever likely to forget. After being together at a party at a mutual friend's house, the victim accepted a snow machine ride home from the defendant. However, after the defendant drove at speeds in excess of 60 miles per hour through the village, the victim was begging him to stop and let him off. Rather than stopping the defendant told his terrified passenger to "hold on, here we go" as he approached a large snow berm which he proceeded to attempt to jump. In doing so the passenger was thrown off the snow machine and suffered a major fracture to his right leg when he landed some 30 feet away. The defendant

remains in custody on bail of \$5000 and a June trial date is pending.

A 25-year-old Fairbanks man was sentenced to a flat five-year sentence for his involvement in a mail theft ring which had operated around Fairbanks late last fall. After being indicted for multiple counts of forgery and theft, the defendant plead to one count of forgery with an agreement to a flat five-year sentence. It is believed that the mail theft ring operated to supply money for drugs, and this defendant admitted to having a significant methamphetamine habit, having had a prior Oregon conviction for possession of methamphetamine. The judge strongly suggested that the defendant take any sort of drug counseling that might be available to him while incarcerated, saying "If you don't kick this habit you'll end up being in and out of jail for the rest of your life, which is likely to only be a very short one at your pace".

April's grand jury also saw five other individuals indicted for more than 100 charges of theft, forgery and unlawful use of an access device for actions relating to the same mail theft and fraud ring.

Juneau DAO

ADA Jack Schmidt had success prosecuting repeat domestic violence offender, Steven M. Kuehnel, in a three count felony assault jury trial. The defendant represented himself in the proceedings. The trial took approximately four days and the jury was only out for seven minutes. The quick conviction was attributed to a prior 404(b) incident on June 6, 2008, as well as the defendant's continued power and control over the victim during the trial. The defendant was having unauthorized contact with the victim prior to and during the trial. The state did not believe the victim was going to be available for trial as she was avoiding contact with the offices.

When the state learned of taped phone conversations at the jail, and reported this to the

court, the victim showed up near the end of the state's case. She subsequently testified that it was all her fault and the defendant ordered her to look at the jury in the eye and tell them that it was her fault. A two minute portion of a jail tape was played for the jury with the defendant telling the victim to stay hidden and that the state's case would be dismissed without her. He also told her he would be home in a month and that she was a "good girl." The state anticipates filing future witness tampering charges against the defendant related to the jail phone calls.

ADA Angie Kemp tried Robert Eberhardt for a felony DUI. Following a guilty verdict on the DUI, the state presented the defendant's two prior out-of-state convictions. The jury also returned a guilty verdict as to the priors. The defendant is now facing a presumptive sentence of three to five years for two felony convictions out of Washington.

Kodiak DAO

April in Kodiak began with record snow falls which resulted in the closure of the office for a day. However, in the digging out process, business remained steady.

Pending resolution and trial of a property case and a felony probation violation, a Kodiak man was arrested after new charges for felony assault were referred to the office. During the month this same man was indicted for a separate felony theft and other cases have been referred to the office.

A 21-year-old female previously indicted for sexual abuse of a minor was indicted regarding a second victim. The matters are awaiting trial in June.

Kodiak police stopped a driver to issue a warning for exceeding the posted speed. Things did not go so well for the driver, who had an outstanding warrant from 2004 directing his arrest as a

California parole fugitive. The extradition process is proceeding.

Domestic violence cases are occurring consistently with multiple cases filed each week.

During the month the office participated along with the Kodiak Police Department in a child interview training presentation for local law enforcement.

Palmer DAO

In Valdez, Jeremy Duncan was sentenced to 35 years with 8 years suspended, and sex offender registration for life, after being convicted after a trial for sexual abuse of a minor in the first degree. ADA Michael Perry was the trial prosecutor.

A Palmer jury convicted Gene Martin, Jr. of four counts of misconduct involving a controlled substance in the second degree and one count of misconduct involving a controlled substance in the fourth degree for manufacturing methamphetamine. At the time, Martin was on felony probation for a drug offense. The trial prosecutor was ADA Allison Collins.

Alexandr Kilimnik was convicted of felony eluding after a jury trial. Kilimnik fled from police for over five miles at speeds exceeding 100 miles per hour, abandoned his car in a driveway and ran into the woods. After two hours of searching, a trooper saw another driver pick Kilimnik up and made the arrest. ADA Trina Sears prosecuted this case.

Bernt "Ryan" Bishop was sentenced to serve five years with six months suspended (four and one-half years to serve), and five years of felony probation, after pleading guilty to misconduct involving a controlled substance in the second degree. Bishop, who had no criminal history, and two of his brothers were involved in a family heroin dealing enterprise. Co-defendant Jesse Bishop will be sentenced on May 5, 2009 for his second conviction of misconduct involving a

controlled substance in the second degree. The prosecutor was ADA Richard Allen.

Caralinda Roullier was convicted of DUI by a Palmer jury. Roullier's Datamaster result was .085, and the judge allowed the defense to make a jury nullification argument. The jury deliberated about half an hour before returning the guilty verdict. ADA Michael Perry was the trial prosecutor.

Gus MacCauly was indicted on one count of sexual assault in the first degree and one count of incest for physically assaulting and raping a family member. The victim ran from the residence and called 911 from a neighbor's home. MacCauly, who has a lengthy criminal record, remains in custody. The prosecutor was ADA Rachel Gernat.

In Cordova, Michael Burch was sentenced to 8 years with 3 years suspended, and 10 years of felony probation, for sexual abuse of a minor in the second degree. Twenty-three-year-old Burch had sex with a 13-year-old girl. Burch told police he thought the girl was 15 (still illegal) and her MySpace page listed her as being 15. ADA Shawn Traini prosecuted this case.

ADA Rachel Gernat gave an internet safety presentation to the Mat-Su School District Palmer Elementary Schools. The presentation gave parents and educators tips on how to protect children from online predators.

ADA Jarom Bangerter attended the Arctic Man competition at Summit to assist Alaska State Troopers with law enforcement at the event.

SAVE THE DATE

NAAG Summer Meeting, Colorado Springs, Colorado
June 16-18, 2009

CWAG Annual Meeting, Sun Valley, Idaho
August 2-5, 2009